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CTX Properties, Inc. v. Andy Rukavina : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

CTX PROPERTIES, INC., a Nevada corporation,

Plaintiff and Appellee,

vs.

ANDY RUKAVINA,

Defendant and Appellant.

APPELLANT'S REPLY BRIEF
Priority No. 15

Appeal No. 950823-CA
Judge Ann Stirba

THIS IS AN APPEAL FROM THE THIRD DISTRICT COURT, SALT LAKE COUNTY, STATE OF UTAH, ON VARIOUS MOTIONS AND THE COURT'S ENFORCEMENT OF A SETTLEMENT OFFER

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A. A SETTLEMENT BASED UPON THE TWO LETTERS OF COUNSEL SHOULD NOT HAVE BEEN ENFORCED.

CTX in its Brief claims that the terms of the settlement are contained in the two letters exchanged by counsel. There are several problems with this assertion. First, the terms discussed in the letters exchanged by counsel were never agreed to by all the parties; Second, letters were never exchanged by counsel for all the parties involved; and finally, CTX proceeded contrary to the terms in the letters, both in this case and the other cases discussed in the letters.

Both of the letters exchanged required a global settlement of a total of five cases. CTX's letter of March 14, 1995 (record 720-721) requires "a global settlement of all of the above referenced cases," a total of five cases were referenced in the letter. Some of the other cases involved Rukavina as a party, and some of the other cases did not involve Rukavina as a party. One of the case, CTX Properties v. Eloise Barney, involved another party, i.e. Eloise Barney, who was not even represented by Shane Smith or Budge Call, of Smith & Hanna.

Eloise Barney was represented by attorney Lynn Mabey of Murphy, Tolboe & Mabey. The March 14, 1995, letter was addressed L. Benson Mabey, Esq., Murphy, Tolboe & Mabey, 124 South 600 East, Suite 100, Salt Lake City Utah, 84102 and the paragraph designated number 4 in the letter deals directly with the settlement terms of CTX Properties v. Eloise Barney. Therefore, Rukavina and his

counsel could not have accepted these terms on behalf of Eloise Barney, and thus, could not have accepted all of the terms of the March 14, 1995 letter in the March 16, 1995 letter. All the parties did not agree or accept the terms set forth in the two letters of counsel, and therefore, the court should not have enforced a settlement based on these two letters.

Furthermore, the letter sent by Rukavina's counsel, dated March 16, 1995, did not accept the terms as proposed in the March 14, 1995 letter for Rukavina. In fact, the March 16, 1995 letter rejected and made modifications to the terms proposed in the March 14, 1995 letter. Thus, Rukavina, in effect, rejected the proposal in the March 14, 1995 letter and made a counteroffer to CTX. CTX, however, did not accept this counteroffer, refused to settle all the cases, and proceeded with litigation in this case, and in the other cases.

The parties knew and understood there was no settlement reached on the terms discussed in the letters. The parties' conduct is evidence of this. The parties did not execute the Settlement Agreement and CTX elected to continue with litigation in all the cases[1]. CTX even continued with its motions in this case, which were heard on April 3, 1995, more than two weeks after the letters were exchanged in this case. This alone, would estop CTX

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[1]. CTX claims that the fact it decided not to seek enforcement of the settlement in the other cases is irrelevant; however, it is relevant when the agreement CTX claimed was reached between the parties in the two letters was an agreement to settle all the cases. Furthermore, the actions of CTX in proceeding with this case alone is sufficient to show no agreement was reached and/or to constitute waiver and estoppel.

from claiming that a settlement was reached. CTX cannot pursue, and the court cannot rule, on CTX's Motions in April of 1995, and then go back and enforce a settlement allegedly reached through letters exchanged a month earlier in March 1995[2].

Moreover, CTX in its Brief claims that the court made a finding that the parties' failure to reach an agreement was "comparatively unsubstantial" to bar enforcement of the settlement agreement. The court never made such a finding and CTX has failed to cite this alleged finding to the record, as required under the rules. To reach a settlement there must be a meeting of the minds, as in contract law, if the court did find that the failure to reach an agreement was unsubstantial, such a finding would be in error.

Finally, this is not a case of Rukavina simply trying to welch out of an agreement. All of the parties had not yet reached an agreement and it was CTX who rejected Rukavina's counteroffer in the March 16, 1995 letter and proceeded with litigation in this case, as well as, in the other cases.

B. THE GLOBAL SETTLEMENT REQUIRED IN THE TWO LETTERS COULD NOT BE UNILATERALLY WAIVED BY CTX.

CTX's claim that the global settlement required in the letters could simply be waived by CTX fails for several reasons. First, the letter of March 16, 1995, did not simply accept the terms of the March 14, 1995 letter as written. It rejected and

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[2]. CTX's argument that it had to proceed with litigation is not valid. CTX could have filed its Motion to Enforce Settlement prior to these hearings. CTX did not file its Motion to Enforce Settlement until after the hearings.

made modifications to a number of terms in the March 14, 1995 letter, and therefore, constituted a rejection of the March 14, 1995 letter and a counteroffer. Cal Wadsworth Constr. v. St. George, 865 P.2d 1373, (Utah 1993) (a reply to an offer, though purporting to accept it, which adds qualifications or requires performance of conditions, is not an acceptance but is a counter-offer), accord Candland v. Oldroyd, 248 P. 1101, 1102 (Utah 1926).

Therefore, the global settlement was not solely the requirement of CTX, but also of Rukavina as contained in his counteroffer of March 16, 1995. In fact, the modifications and requirements of Rukavina contained in the March 16, 1995, letter dealt with the settlement terms proposed in the other cases.

CTX also claims that only CTX was to benefit from the global settlement. This is simply not true. The global settlement was not only to benefit CTX, but also Rukavina. For example, in the global settlement, Rukavina was to settle another case, in which he was a party with a principal of CTX, styled Rukavina v. Triatlantic. This case is referenced in the letters, and in the March 16, 1995 counteroffer of Rukavina, Triatlantic was to forgive its judgment against Rukavina in this case. (See paragraph b of March 16, 1995 letter, record 825). Rukavina was obviously to obtain a benefit from the global settlement; therefore, CTX cannot simply waive this requirement.

C. THE COURT SHOULD NOT HAVE GRANTED CTX'S MOTION FOR JUDGMENT ON THE PLEADINGS.

The trial court should not have granted judgment on the pleadings in this case. In the pleadings filed by Rukavina he

claims that he is entitled to relief for a number of reasons, the claim that he was the owner of the property pursuant to the lease and the option to purchase contained in the lease was only one assertion.

In accepting the allegations in Rukavina's pleadings as true, the court could not have granted judgment on the pleadings against Rukavina in this case. The court may have later found that Rukavina was entitled to relief, including possession of the property, under the other claims raised in the pleadings, including the promises made by CTX, the waiver by CTX, the mutual mistake of the parties at the time the option was entered into, or under the enforcement of the Settlement Agreement entered into by CTX and Barney, wherein CTX agrees to honor the lease and option on Rukavina's behalf. The court's ruling that the option provision is legally unenforceable, although in error, is not alone sufficient to warrant a total judgment on the pleadings, as Rukavina may have been entitled to relief under the other claims in his pleadings.

D. THE TERMS OF THE OPTION ARE NOT TOO INDEFINITE AS A MATTER OF LAW.

The terms in the option provision are not too indefinite, as a matter of law, to be enforceable. A method was agreed to, at the time, for calculating a purchase price for the property. This agreed method is definite enough for an option to purchase real estate. Property Assistance v. Roberts, 768 P.2d 976 (Utah App. 1989). The parties did not agree to negotiate a fair sales price in the future, but only agreed to wait until the expiration of the lease to obtain appraisals to **determine** the fair sales price. The

language "to **determine** a fair sales price," is ambiguous. It is not known whether the parties had agreed on a method for calculating a sales price using the appraisals, which were to be implemented at the time the lease expired; or whether the parties were going to obtain the appraisals and then sit down and renegotiate a sales price.

The undisputed affidavits show that the parties agreed on a definite method to calculate the sales price, e.g. the average of the two appraisals, and that the appraisals were simply to be plugged into the previously agreed formula to determine the sales price. Parol evidence should have been considered by the court in determining what the parties' intention was as to the language "to determine a fair sales price." Property Assistance v. Roberts, Id.

E. THE OPTION PROVISION IS NOT AN INTEGRATED CONTRACT; THE TRIAL COURT SHOULD HAVE CONSIDERED PAROL EVIDENCE IN MAKING THIS DETERMINATION.

The question of interpretation of a contract is a question of law for the court. The court must determine by process of interpretation what the writing means. Before considering the applicability of the parol evidence rule in a contract dispute, the court must first determine whether the parties intended the writing to be an integrated contract. To resolve this question any relevant evidence is admissible. Union Bank v. Swenson, 707 P.2d 663, 665 (Utah 1985). The trial court erred in failing to first determine and rule on the issue as to whether the option was intended as integrated contract before ruling on the admissibility of parol evidence. Id. at 665.

The trial court should have considered all relevant evidence, including the affidavits of the individuals negotiating the contract, to determine if the contract was intended as an integrated contract. See Ward v. Intermountain Farmers, 277 UAR 58 (Ut.App. 1995) (when determining whether a contract is ambiguous, any relevant evidence must be considered. Other wise the determination of ambiguity is inherently one-sided, namely it is based solely on the "extrinsic evidence" of the judge's own linguistic education and experience. Although the terms of an instrument may seem clear to a particular reader -including a judge- this does not rule out the possibility that the parties chose the language of the agreement to express a different meaning. A judge should therefore consider any credible evidence offered to show the parties' intention). Id.

The undisputed affidavits submitted reveal that the option provision was not intended as an integrated contract. The affidavits set forth the specific terms agreed to in explanation of the language used in the option provision (last sentence of paragraph 15), stating that, "Each agent shall obtain a separate appraisal and at that time a fair sales price shall be determined."

Furthermore, parol evidence should be considered when it appears that a complete and binding agreement may be voidable for fraud, duress, mutual mistake or the like, or it may be illegal. Warner v. Sirstins 838 P.2d 666, 669 (Ut.App. 1992). Such invalidating causes need not and generally do not appear on the face of the writing. Therefore, parol evidence may be admitted to show

mutual mistake occurring when both parties, at the time of contracting, share a misconception about a basic assumption or vital fact, upon which they base their bargain. Id. at 669. This is clearly shown in the affidavits submitted, as both parties assumed that the language they had chosen was sufficient to determine a definite purchase price for an enforceable option to purchase.

Furthermore, even reading the face of the contract itself, indicates that the option provision was not intended as an integrated contract. Paragraph 15 states that "there are no terms of this agreement different (sic) from any of the proceding (sic) numbered paragraphs or in addition thereto **except the following:"** (emphasis added). The option provision then follows. The option provision therefore, clearly was not intended as part of an integrated contract and the court should have considered all relevant evidence in interpreting the option provision.

F. THE TRIAL COURT ERRED IN STRIKING RUKAVINA'S MOTION TO ENFORCE THE SETTLEMENT AGREEMENT REACHED IN CTX PROPERTIES V. BARNEY.

CTX cannot and does not argue the merits of this Motion. The law in Utah is well settled that a third party beneficiary to a contract has the right to enforce the terms of the contract. This includes third party beneficiaries of settlement agreements. L&A Drywall, Inc. v. Whitmore Construction, 608 P.2d 626 (Utah 1980). See also Hansen v. Greenriver Group, 748 P.2d 1102, 1104 (Ut.App. 1988).

CTX and Barney, entered into a Settlement Agreement in CTX Properties v. Eloise C. Barney, Civil No. 900903134 PR, and as a condition of that settlement, Barney requested that CTX honor the option provision with Rukavina. The Settlement Agreement with Barney specifically provides, in clear and unambiguous language, that CTX will honor the option agreement contained in the lease with Rukavina.

By filing this action CTX breached the terms of its Settlement Agreement by asserting, that the option is unenforceable and by refusing to honor the option exercised by Rukavina. Furthermore, any potential defense to the enforcement of the option agreement was waived by CTX in the Settlement Agreement. Surety Life Ins. Co. v. Rupp., 853 P.2d 366, 370 (Ut.App. 1992) (a party may legally contract to waive a defense); Continental Bank & Trust Co. v. Utah Sec. Mortg., 701 P.2d 1095, 1098 (Utah 1985), (finding of trial court on summary judgment that unambiguous language in guaranty agreement waives guarantors' defenses is affirmed).

Since Rukavina is a third party beneficiary to the Settlement Agreement, which specifically provides that CTX will honor the option entered into with Rukavina, and this is a separate agreement from the lease itself, Rukavina's Motion to Enforce the Settlement Agreement with Barney should not have been summarily stricken by the Court based on the Court's interpretation of the separate lease agreement entered into by Rukavina.

Rukavina is entitled to the enforcement of the terms of the Settlement Agreement with Barney to protect his rights.

Cerritos Trucking Co. v. Utah Venture No. 1, 645 P.2d 608 (Utah 1982) (action for specific performance of option agreement to purchase realty granted and affirmed); Bradshaw v. Kershaw, 627 P.2d 528 (Utah 1981); Garland v. Fleisch, 831 P.2d 107 (Utah 1992).

G. THE TRIAL COURT FOR ERRED IN RETROACTIVELY *REINSTATING THE APRIL 20, 1993 JUDGMENT.*

The trial court erred in reinstating the April 20, 1993 Judgment which was previously vacated for lack of standing and jurisdiction. Utah Statute 16-10a-1502 U.C.A., precludes a foreign corporation from bringing or maintaining an action in the State until an application is filed with the division. Therefore, the court does not have jurisdiction over any matter brought by a foreign corporation until an application is filed. This standing and thus, jurisdiction, cannot be applied retroactively. Stephens v. Henderson, 741 P.2d 952 (Utah 1987). § 68-3-3 U.C.A. specifically provides that a statute shall not be retroactively applied, unless it is so declared in the statute.

The subsequent subsection, § 16-10a-1502(3) U.C.A., allows the court to say a proceeding, until it determines whether the foreign corporation is required to file an application and if so the court is to further stay the proceeding until an application has been filed.

CTX may proceed to obtain judgment, but only after an application has been filed. By reinstating the Judgment, the court has allowed CTX to totally circumvent the requirements of § 16-10a-1502(1), and by holding that the proceedings taken by CTX while an

unregistered corporation are merely voidable and not void, the court has rendered the total section of no effect.

Consistent with the language in the statute and to render the statute its intended effect, the better interpretation is that the matter is stayed and that any proceedings are stayed and thus void, until an application has been filed.

H. THE COURT ABUSED ITS DISCRETION IN DENYING RUKAVINA'S MOTION TO AMEND HIS COMPLAINT.

The trial court abused its discretion in not allowing Rukavina to amend his complaint. CTX was not unfairly prejudiced and had plenty of opportunity to answer the amended complaint, complete discovery and prepare for trial.

The Third Party Defendants (as principals of the Plaintiff CTX) were well aware of the action, and Third Party Defendant Barney actually accepted service of the Third Party Complaint and filed an Answer to the Third Party Complaint.

Rule 15 URCP, provides that a party may amend his pleading by leave of court and that leave of court shall be freely given when justice so requires. The primary considerations in considering a motion to amend are, whether the parties have adequate notice to meet the new issues, and whether any party receives an unfair advantage or disadvantage. Ringwood v. Foreign Auto Works, Inc., 786 P.2d 1350 (Ut.App. 1990) cert. denied, 795 P.2d 1138 (Utah 1990); See also Bekins Bar V Ranch v. Huth, 664 P.2d 455 (Utah 1983) (determination depends on whether opposing party would be put to unavoidable prejudice by having an issue adjudicated for which he had not had time to prepare).

In this case, there was no unfair advantage or unavoidable prejudice due to not enough time to prepare. On November 18, 1994, pursuant to the court's own Order a Scheduling Conference was held wherein cut-off dates and deadlines were set. A discovery deadline was set for February 28, 1995. A motion deadline was set for December 9, 1994. The court set a hearing date on all motions for January 30, 1995 at 1:30. (Record 303). Rukavina's Motion to Amend was filed on the deadline set by the court, December 9, 1994 (Record 310) and well before the discovery deadline.

CTX was not unduly prejudiced and had ample opportunity to conduct further discovery and prepare for any new issues. Rukavina's Motion to Amend was filed within the time deadline set by the court and relied upon by Rukavina. The court abused its discretion and Rukavina was unduly prejudiced, by the court's denial of Rukavina's Motion to Amend in this case when Rukavina filed his motion on the deadline set by the court, and well before the discovery deadline.

I. THE THIRD PARTY COMPLAINT SHOULD NOT HAVE BEEN DISMISSED AFTER BARNEY ACCEPTED SERVICE.

Rule 4(b) URCP, provides that "in any action brought against two or more defendants on which service has been obtained upon one of them within the 120 days or such longer period as may be allowed by the court, the other or others may be served or appear at any time prior to trial."

The Third Party Complaint as against Barney should not have been dismissed for untimely service under Rule 4(b) URCP after Barney agreed to accept service in the case and filed an Answer to

the Third Party Complaint. Any claim regarding the untimely service of Barney was thereby waived. The Court's dismissal, although without prejudice, greatly adds to the delay and cost of litigation and therefore, should not be allowed in this case.

Rule 4(b) URCP provides that once one defendant is served the other defendants can be served or appear at any time prior to trial. This is to prevent the preclusion of adding additional defendants after three months. Valley Asphalt, Inc., v. Eldon J. Stubbs Contsr., Inc., 714 P.2d 1142 (Utah 1986). Barney, one of the Third Party Defendants in this case was served and therefore Wright, as an additional Third Party Defendant in this action, may be served at any time prior to trial. Id.

The trial court erred in dismissing the Third Party Complaint against Wright under Rule 4 URCP. The court certainly erred in dismissing Barney from the case after Barney had already accepted service of the Third Party Complaint and had filed an Answer to the Third Party Complaint.

CONCLUSION

The trial court erred in enforcing the settlement agreement in this case, based on two letters proposing a global settlement of five cases, which was never agreed to by all the parties.

The court erred in failing to make an initial determination, considering all the evidence, as to whether the parties intended the option provision to be an integrated contract, before ruling on the exclusion of parol evidence.

The trial court erred in granting judgment on the pleadings, finding the option provision too indefinite to be enforceable, when there was a definite method agreed to for calculating the purchase price. The trial court erred in finding that the option provision was not ambiguous, so as to allow parol evidence to determine its meaning.

The trail court erred in striking Rukavina's Motion to Enforce the Settlement Agreement entered in CTX v. Barney, a separate case, when Rukavina was clearly an intended beneficiary.

The trial court erred in retroactively reinstating a judgment entered when CTX had no standing and the court had no jurisdiction over the matter.

Finally, the trial court abused its discretion in denying Rukavina's Motion to Amend and in dismissing the Third Party Complaint, when Third Party Defendant, Barney had accepted service and filed an Answer to the Third Party Complaint.

RELIEF SOUGHT

This Court should reverse the trial court's final Order, and find that there was no global settlement reached as proposed in the two letters of counsel, and that CTX is not entitled to unilaterally change the terms of the global settlement discussed, to enforce settlement in this case only, while proceeding with litigation in this case, as well as, the other cases.

This Court should find that the option provision was not intended as an integrated contract and that it is ambiguous, thus requiring the consideration of parol evidence. This Court, upon

consideration of all the evidence, should find that there was a definite method agreed to for calculating the purchase price, and thus, the option is enforceable as a matter of law.

This Court should vacate the trial court's Judgment on the Pleadings and allow Rukavina to file his amended pleadings, to proceed against the Third Party Defendants, and be entitled to have a hearing on the merits of his Motion to Enforce the Settlement Agreement entered into between CTX and Barney.

DATED this 9th day of September, 1996.

SMITH & HANNA

By: 
Budge W. Call

CERTIFICATE OF MAILING

I hereby certify on the 9th day of September, 1996, two (2) correct copies of the foregoing APPELLANT'S REPLY BRIEF was mailed, postage prepaid, to the following:

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